

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

NOS. 77-4083 & 77-4099

**UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT**

THE LONG ISLAND COLLEGE HOSPITAL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

and

LOCAL 144, MOTEL, HOSPITAL, NURSING HOME
AND ALLIED SERVICES UNION, SEIU, AFL-CIO,

Intervenor.

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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ON PETITION FOR REVIEW AND CROSS-APPLICATION
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COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether the Board properly found that the Hospital violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union which was certified as the representative of its plant maintenance and engineering department employees.

2. Whether the Board's order is reasonable and proper.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of The Long Island College Hospital ("the Hospital") to review, and on cross-application of

the National Labor Relations Board to enforce, an order of the Board issued on February 9, 1977, against the Hospital pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151, et seq.). The Board's Decision and Order (A. 486-499, 521-522)^{1/} are reported at 228 NLRB No. 13. On June 27, 1977, the Court granted the motion of Local 144, Hotel, Hospital, Nursing Home and Allied Services Union, SEIU, AFL-CIO ("the Union") to intervene in the proceedings. A brief has been filed with the Court on behalf of the American Hospital Association as amicus curiae. This Court has jurisdiction under Section 10(e) and (f) of the Act, the unfair labor practices having occurred at New York, New York, where the Hospital is engaged in providing hospital, health care and related services (A. 487).

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Hospital violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the representative of its plant maintenance and engineering department employees. In so finding, the Board extended comity to representation proceedings conducted by the New York State Labor Relations Board ("the SLRB") in which a bargaining unit of such employees was found to be appropriate.

A. The Representation Proceeding Before the New York State Labor Relations Board

On July 1, 1963, the Union filed a representation petition with the SLRB seeking certification as the exclusive bargaining agent of the Hospital's

^{1/} "A." references are to the appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

service and maintenance employees, including the employees in the plant maintenance and engineering department. Thereafter, on March 26, 1964, another labor organization, Maintenance Division of the Building and Construction Trades Council ("the Maintenance Division"), filed a representation petition seeking certification as the bargaining representative of a unit limited to the plant maintenance and engineering department employees (A. 523-524, 526). Following a consolidated hearing to determine, inter alia, the scope of the bargaining unit (A. 524), the SLRB issued its Decision, Order and Direction of Elections on July 6, 1964 (A. 523-536).^{2/}

In its decision, the SLRB concluded that whether the plant maintenance and engineering employees should constitute a separate unit or be included in a combined service and maintenance unit would be decided by the employees themselves in a self-determination election (A. 529). The SLRB noted that both units were equally appropriate in the circumstances of the case. In finding that a unit limited to the plant maintenance and engineering department would be appropriate, the SLRB stated (A. 528-529):

The employees in this department, and the helpers, are skilled men who perform types of services identified with traditional trades and crafts. They have more in common with one another than with the other service employees, such as porters, maids, nurses' aides, laundry and kitchen workers. There is no interchange between the employees of this department and any other department in the hospital

^{2/} The Long Island College Hospital, 27 SLRB 405 (1964).

Consequently, the SLRB directed an election among the Hospital's maintenance and service employees in which the maintenance employees, in addition to selecting which, if any, union would be their bargaining representative, were given the choice of whether they wished to be represented in a separate unit or in an overall service unit (A. 533-535).^{3/}

The July 22, 1964, representation election among the 55 eligible plant maintenance and engineering department employees resulted in 21 votes for a separate bargaining unit, 5 against, 20 blank ballots and 1 challenged ballot. As to the question of union representation, these employees cast 24 votes for the Union, 4 for the Maintenance Division, 16 for neither union, 2 blank ballots and 1 challenged ballot (A. 488; 533).^{4/}

^{3/} The ballot used by the plant maintenance and engineering employees read (A. 533-534):

1. Do you want a separate bargaining unit limited only to maintenance of plant and engineering department employees? (to be answered "Yes" or "No")
2. If there is a separate unit of maintenance of plant and engineering department employees, do you then desire to be represented for the purposes of collective bargaining by Maintenance Division, or by Local 144, or by neither?
3. If there is a combined unit of maintenance of plant and engineering department employees and service employees, do you then desire to be represented for the purposes of collective bargaining by Local 144? (to be answered "Yes" or "No")

^{4/} The Union was defeated in its bid to represent the Hospital's service employees (A. 488; 553).

On July 29, 1964, the Hospital filed objections to the election which were overruled by the SLRB as being insufficient and without merit (A. 553). Thus, on December 28, 1964, the Union was certified as the bargaining representative of the Hospital's employees in a unit consisting of (A. 487-488):

All full-time and regular part-time employees in the maintenance of plant and engineering department, excluding chief engineers, assistant chief engineers, clerk and maintenance supervisor, [and all supervisors as defined in Section 2(11) of the Act.]

Following the SLRB certification, the Hospital refused to bargain with the Union, contending, inter alia, that the unit was inappropriate (A. 488). The Union then initiated proceedings against the Hospital by pursuing the arbitration remedy for "disputes" between non-profitmaking hospitals and unions as provided by Section 716 of the New York State Labor Relations Act ("the SLRA"). The Hospital sought to enjoin the Section 716 proceedings and on November 7, 1968, the New York Court of Appeals reversed lower court holdings in favor of the Union. The Court of Appeals held that "disputes" as defined in Section 716 did not include representation issues and that, instead, the Union should have filed an unfair labor practice charge under Section 704(6) of the SLRA against the Hospital for its refusal to bargain (A. 488; 554-557).^{5/}

^{5/} Long Island College Hospital v. Catherwood, 23 N.Y. 2d 20, 241 N.E. 2d 892 (1968), appeal dismissed, sub nom, Ottley v. Long Island College Hospital, 394 U.S. 716 (1969).

B. The Unfair Labor Practice Proceeding Before
the New York State Labor Relations Board

Accordingly, the Union filed an unfair labor practice charge with the SLRB on May 7, 1969, alleging that the Hospital was unlawfully refusing to bargain (A. 489; 551). On May 13, 1969, the Hospital filed a motion with the SLRB to vacate the Union's certification on the ground of delay, and that with the passage of time there had been a change in the composition of the unit. On May 16, 1969, the SLRB denied the motion and issued a complaint (A. 488-489; 551, 554). In its answer, the Hospital conceded that it had refused to bargain, but challenged the validity of the SLRB's certification (A. 489; 551-552, 558).

A hearing was conducted and on June 30, 1971, the SLRB issued its decision and order affirming its finding that a separate unit of plant maintenance and engineering department employees constitutes an appropriate unit for collective bargaining and holding that the Hospital was unlawfully refusing to bargain collectively with the Union as the exclusive representative of those employees (A. 489; 537-550). Affirmatively, the SLRB ordered the Hospital, upon request, to bargain collectively in good faith with the Union (A. 550).

A proceeding to review the SLRB's findings and order was brought by the Hospital, and the SLRB's unit determination and its use of a self-determination election procedure were upheld by the Appellate Division

6/ The Long Island College Hospital, 34 SLRB 324 (1971).

of the New York Supreme Court (A. 489).^{7/} On appeal, the New York Court of Appeals affirmed the lower court stating (A. 489):^{8/}

The Appellate Division was eminently correct insofar as it affirmed the board's determination that the hospital's skilled maintenance employees constituted an appropriate bargaining unit

Accordingly, the board's practice, resulting in the establishment of a separate bargaining unit of skilled maintenance employees, seems eminently proper and, certainly, may not be stamped as either arbitrary or capricious.

Nor in our view, is there any valid basis for the hospital's attack on the conduct of the election-- viz., the form of the ballot, the tabulation of the votes and the union's election campaign literature.

C. The Unfair Labor Practice Proceeding
Before the National Labor Relations Board

As a result of the Court of Appeals' affirmance of the SLRB's bargaining order, in March 1974, nearly 10 years after the Union was certified, the Hospital entered into negotiations with the Union. It continued, however, at each negotiating session, to reassert its position that the unit was inappropriate (A. 490; 140-141, 355-356). While negotiations continued, the "hospital amendments" to the National Labor Relations Act became effective on August 25, 1974, whereby the Board's jurisdiction was extended to include

^{7/} Long Island College Hospital v. New York State Labor Relations Board, Local 144, etc., 39 A.D. 2d 913, 333 N.Y.S. 2d 23 (1972).

^{8/} Long Island College Hospital v. New York State Labor Relations Board and Local 144, etc., 32 N.Y. 314 (1973), 298 N.E. 2d 614, cert. denied, 415 U.S. 957 (1974).

non-profit health care institutions (A. 490)^{9/}. In mid-August 1975, the Hospital abruptly refused to bargain further, on the ground that it believed that the unit was not appropriate for collective bargaining (A. 490; 6, 11, 141-142, 355-356). Thereafter, the instant proceeding was initiated by the Union, when it filed a charge with the Board alleging the Hospital's refusal to bargain to be a violation of Section 8(a)(5) and (1) of the Act.

II. THE BOARD'S DECISION AND ORDER

The Board found that the Hospital violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive bargaining representative of its plant maintenance and engineering department employees. In so finding, the Board extended comity to the SLRB's finding that those employees constitute an appropriate unit for the purpose of collective bargaining.

The Board's order requires the Hospital to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights. Affirmatively, the order requires the Hospital to bargain with the Union upon request with the Union and to post appropriate notices (A. 497-498).

^{9/} Public Law 93-360, 93rd Congress, 2nd Sess. (88 Stat. 395).

ARGUMENT

- I. THE BOARD PROPERLY FOUND THAT THE HOSPITAL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION WHICH WAS DULY CERTIFIED AS THE REPRESENTATIVE OF ITS PLANT MAINTENANCE AND ENGINEERING DEPARTMENT EMPLOYEES

- A. The Board Properly Granted Comity to the SLRB Representation Proceeding

It is a well-established policy of the Board to recognize the results of representation proceedings conducted by a responsible state agency and to extend comity to a certification issued pursuant to such proceedings where the state agency's procedures conform to due process requirements and are not contrary to the mandates of the National Labor Relations Act. Accordingly, a state-conducted election which is free of irregularities and reflects the true desires of the employees is accorded the same effect as a Board-conducted election. See Mercy-Memorial Hospital Corp., 221 NLRB 1, 2-3 (1975); ^{10/} Cornell University, 183 NLRB 329, 334 (1970); Screen Print Corporation, 151 NLRB 1266, 1270 (1965); The West Indian Co., Ltd., 129 NLRB 1203, 1204 (1961); Bluefield Produce & Provision Company, 117 NLRB 1660, 1663 (1957). This policy has been well recognized and approved by this Court and other courts. See N.L.R.B. v. St. Luke's Hospital Center, 551 F. 2d 476, 482 (C.A. 2, 1976); St. Joseph's Hospital v. N.L.R.B., 542 F. 2d 495 (C.A. 8, 1976), enforcing, 221 NLRB 1253 (1975); N.L.R.B. v. Western Meat Packers Inc., 350 F. 2d 804, 805 (C.A. 10, 1965); Intalco Aluminum Corporation

^{10/} Enforcement proceeding pending, N.L.R.B. v. Mercy-Memorial Hospital Corp. No. 76-2338 (C.A. 6).

v. N.L.R.B., 417 F. 2d 36, 40 (C.A. 9, 1969); Getreu v. Bartenders and Hotel and Restaurant Employees Union, Local 58, 181 F. Supp. 738, 741 (N.D. Ind., 1960); Methodist Hospital of Brooklyn v. New York State Labor Relations Board, 382 F. Supp. 459, 461, n. 12 (S.D.N.Y., 1974).^{11/}

As the Board noted in St. Joseph's Hospital, supra, 221 NLRB at 1253, ". . . it is not a touchstone of comity that the procedures and policies of a state agency be identical to those of the Board. All that is required is that the state proceedings violate neither due process nor the specific mandates of the Act." Thus, in applying the Board's comity standard to determinations of the appropriate bargaining unit by state agencies, the Board will recognize and treat as its own such unit determinations, "provided that . . . the bargaining units established thereby are not repugnant to the policies of the [National Labor Relations] Act." Mercy-Memorial Hospital Corporation, supra, 221 NLRB at 3. Accordingly, the Board has denied comity to state-determined units only where such units were violative of a specific provision of the Act. See St. Luke's Hospital Center, 221 NLRB 1314, 1315-1316 (1976), enforced, 551 F. 2d 476, 482-483 (C.A. 2, 1976); Brookhaven Memorial Hospital, 214 NLRB 1010 (1974); and Mental Health Center of Boulder County, Inc., 222 NLRB 901 (1976), where the Board denied comity because the state-determined unit combined professional and nonprofessional employees contrary to the direction of Section 9(b)(1) of the Act; Worcester

^{11/} Cf. Memorial Hospital of Roxborough v. N.L.R.B., 545 F. 2d 351 (C.A. 3, 1976), discussed infra, pp. 14-15.

Polytechnic Institute, 207 NLRB 1061 (1973), where comity was denied because the unit combined guards and nonguards in violation of Section 9(b)(3); and Southern Minnesota Supply Company, 116 NLRB 968, 969, (1956), where comity was denied because the unit included supervisors excluded from the Act's coverage by Section 2(3). This policy is consistent with the statutory scheme under which the Board makes unit determination in its own cases, i.e., broad discretionary authority to determine the appropriate unit in each case under Section 9(b) of the Act, subject to the specific limitations set forth in other provisions of the Act such as Sections 9(b)(1) and 9(b)(3).^{12/}

When the foregoing principles are applied to the instant case, it is clear that the SLRB's representation proceedings violated neither due process nor any specific mandate of the Act. The unit determination

^{12/} Section 9(b) of the Act provides in part that "[t]he Board shall decide in each case whether . . . the unit appropriate for collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . ." It is well settled that "the issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion . . ." Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485, 491 (1947). Moreover, the Board is merely required to choose "an" appropriate unit, not the "only" or even the "most" appropriate unit. MPC Restaurant Corp. v. N.L.R.B., 481 F. 2d 75, 78 (C.A. 2, 1973).

This broad discretion is qualified, however, by Section 9(b)(1) of the Act, which as noted in the text, supra, prohibits the Board from establishing a unit which combines professional and non-professional employees unless the professionals vote for inclusion in the unit, as well as by Section 9(b)(3), which prohibits a unit composed of guards and non-guards.

of the SLRB was made in accordance with Section 705(2) of the SLRA, which provides as follows (A. 490-491):

The board shall decide in each case whether, in order to insure employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; . . . [13/]

Section 705(2) is essentially identical to Section 9(b) of the Act (A. 490-492). In carrying out its statutory responsibility, the SLRA conducted a hearing at which the parties were afforded the opportunity to present evidence with respect to the unit placement of the employees sought to be represented. The SLRB then weighed the various factors traditionally considered by it in reaching unit determinations, including

13/ A craft proviso to Section 705(2) provides (A. 490):

[T]hat in any case where the majority of employees of a particular craft, or in the case of a non-profitmaking hospital or residential care center where the majority of employees of a particular profession or craft, shall so decide the board shall designate such profession or craft as a unit appropriate for the purpose of collective bargaining.

This proviso makes craft units mandatory if desired by the employees but it is inapplicable to the facts of this case because the unions involved did not seek to represent the employees in craft units (A. 490-492; 528). This case is therefore distinguishable from Evinrude Motors Division, 66 NLRB 1142, 1145 (1946) and Wilson-Hurd Mfg. Co., 68 NLRB 853 (1946), where the Board refused to grant comity to state craft unit determinations based solely on a similar statutory requirement (A. 491). Hence, there is no merit to the Hospital's contention (Br. 35-40) that comity is not proper in the instant case because the mandatory craft proviso to the SLRA is alien to the provisions of the NLRA.

homogeneity, earnings, and interchange, against its policy of avoiding "over-compartmentalization" of hospitals into numerous small bargaining units (A. 527-529). And, since the SLRB found these factors to be evenly balanced, it permitted the maintenance employees to decide for themselves whether they desired a separate unit or an overall service unit.^{14/} As noted supra, p. 4, the employees chose to be represented in a separate unit. These state procedures were in accord with the requirements of due process, and the separate unit of plant maintenance and engineering department employees certified by the SLRB is not violative of any specific provision of the National Labor Relations Act. Indeed, such unit is in close conformity with units found appropriate by the Board in similar cases involving health care facilities.^{15/} Thus,

^{14/} Contrary to the claim of the Hospital (Br. 6, 44), the SLRB's self-determination election is quite similar to Board elections wherein the appropriate unit is determined by the desires of the employees. This practice, originating in Globe Machine & Stamping Co., 3 NLRB 294 (1937), is permitted in situations, inter alia, where the several bargaining units proposed by competing labor organizations are equally appropriate, such as a separate unit versus a more comprehensive unit, as is the case here. Whiting Milk Co., 137 NLRB 1143 (1962); Martin-Marietta Corp., 139 NLRB 925 (1962); Court Square Press, Inc., 151 NLRB 861, 865-866 (1965). Moreover, there is no merit to the Hospital's characterization of the three questions, supra, p. 4 n. 3, on the ballot as "confusing" (Br. 7, 44). Rather, the questions were clear and straightforward, and each required but a single answer. Indeed, this issue was raised by the Hospital in the state court proceedings where the New York Court of Appeals found that the ballot presented "no reasonable basis for being confused." 298 N.E. 2d at 619-620.

^{15/} Nathan and Miriam Barnert Memorial Hospital Association, 217 NLRB 775 (1975); West Suburban Hospital, 224 NLRB 1349 (1976); St. Francis Hospital-Medical Center, 223 NLRB 1451 (1976); Sinai Hospital of Detroit, Inc., 226 NLRB No. 61, 93 LRRM 1269 (1976); Eskaton, 225 NLRB No. 97, 92 LRRM 1569 (1976).

we submit, the Board's grant of comity to the SLRB certification was proper.

Contrary to the contention of the Hospital, the legislative history of the 1974, hospital amendment to the Act does not preclude the Board's extending comity to a state agency's bargaining unit determination. While it is true that the aim of Congress in passing the amendments was federal preemption based at least in part on a desire for a uniform national approach to labor relations in non-profit hospitals, neither the language of the amendments nor the legislative history indicate that this objective stripped the Board of its discretion to recognize state representation proceedings.

The Hospital places heavy reliance on Memorial Hospital of Roxborough v. N.L.R.B., 545 F. 2d 351, where the Third Circuit held that the Board lacks power to extend comity to a state labor agency's unit determination. As the basis for its decision, the court relied primarily on the language of Section 9(b) of the Act which states: "The Board shall decide in each case whether. . . the unit appropriate. . . shall be the employer unit, craft unit, plant unit, or subdivision thereof." The court construed this statutory language as a mandate to the Board "to exercise its discretion in each and every case." 545 F. 2d at 360. "This responsibility," the court held, "can neither be delegated to nor discharged by a state agency . . . Ibid. The Third Circuit reached this conclusion even after acknowledging earlier in its opinion that, although the Board is required by the Act to decide in each case whether a unit is appropriate, the Act "is silent as to the manner by which the appropriateness of a unit is to be determined." Ibid. Judge Seitz, in dissent, pointed out

that the "statutory language directing the Board to determine a particular issue does not necessarily preclude the Board from relying on other processes of law, as long as it can assert a sound policy for doing so." 545 F. 2d at 363.

As we have shown, "sound policy" underlies the Board's extension of comity to the SLRB's certification in this case. Comity has long been recognized as a proper basis for decision making under circumstances where continuity and stability of established principles is desired. As the Supreme Court long ago observed in Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488-489 (1900):

Comity is not a rule of law, but one of practice, convenience and expediency . . . [which] has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative Comity persuades; but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided.

And this Court in reviewing a New York SLRB unit determination recently stated in N.L.R.B. v. St. Luke's Hospital Center, supra, 551 F. 2d at 482, citing Cornell University, supra, 183 NLRB at 334, "Arrangements resulting from state agency proceedings should generally be respected if consistent with federal policies." The Court continued, "'Comity' in this sense reflects the desirability of supporting settled relationships in the absence of compelling countervailing reasons." Ibid.

Not only does the Board have a policy, as the instant case indicates, of extending comity to the representation proceedings of responsible state agencies but, similarly, with respect to unfair labor labor practices,

the Board, with judicial approval, has long deferred to arbitration awards in cases where the arbitrator's award has resolved the pending unfair labor practice issues. Spielburg Manufacturing Co., 112 NLRB 1080 (1955); Carey v. Westinghouse, 375 U.S. 261, 270-272 (1964); N.L.R.B. v. Horn & Hardart Co., 439 F. 2d 674, 678-681 (C.A. 2, 1971); Ramsey v. N.L.R.B., 327 F. 2d 784, 787-788 (C.A. 7, 1964), cert. denied, 377 U.S. 1003. Moreover, in Carey v. Westinghouse, supra, 375 U.S. at 270, n. 7, the Supreme Court quoted with approval the following statement of the Board in Raley's, Inc., 143 NLRB 256, 258-259 (1963):

. . . we believe that the same considerations which moved the Board to honor arbitration awards in unfair labor practice cases are equally persuasive to a similar acceptance of the arbitral process in a representation proceeding such as the instant one. . . . [The Board's authority] under Section 9 of the Act. . . to decide questions concerning representation does not preclude the Board in a proper case from considering an arbitration award in determining whether such a question exists.

Accord: N.L.R.B. v. Horn & Hardart, supra, 439 F. 2d at 678-681.

Finally, in Adolph Coors Company, 208 NLRB 676, 677 (1974), the Board gave conclusive effect to state proceedings under the Colorado Antidiscrimination Act in dismissing a complaint alleging a discharge as violative of Section 8(a)(1) of the Act. In each of the foregoing cases in which the Board gave conclusive effect to proceedings of another tribunal, it did so only after satisfying itself that the proceedings were fair and regular (i.e., without substantial deviation from due process requirements)

and the result reached was not repugnant to the purposes and policies of the Act.^{16/}

Thus, the Board has considerable discretion to respect a determination of another tribunal where it will serve the fundamental aims of the Act and in such cases the reviewing court's function is to determine whether the Board abused its discretion. N.L.R.B. v. Horn & Hardart Co. 439 F. 2d at 678-681; Ramsey v. N.L.R.B., supra, 327 F. 2d at 117. See also Lodge 700, International Ass'n of Machinists v. N.L.R.B., 525 F. 2d 237, 244-246 (C.A. 2, 1975); Nabisco Inc. v. N.L.R.B., 479 F. 2d 770, 773 (C.A. 2, 1973). We submit that there has been no abuse of discretion by the Board in this instance.

The Hospital argues against reliance on the comity principle in this case on the ground that the SLRB unit determination runs counter to the Congressional policy reflected in the legislative history of the hospital amendments to the Act that there not be excessive proliferation of bargaining units in the health care industry. While it is true that the legislative history reflects Congress' concern that the Board avoid an undue proliferation of bargaining units in hospitals,^{17/} Congress

^{16/} Cf. Ryder Technical Institute, 199 NLRB 570 (1972) (deferral denied where arbitrator's award "ignored a long line of Board and Court precedent construing the Act."); Roadway Express, Inc., 145 NLRB 513, 515 (1963) (deferral denied where all members of bipartite arbitral panel were "arrayed in common interest against the grievant"). See also, Kansas Meat Packers, 198 NLRB 543, 544 (1972).

^{17/} See Senate Report No. 93-766, 93rd Cong., 2nd Sess. (1974) p. 5 and statement by Representative Ashbrook, 120 Cong. Rec. E 4850 (daily ed. July 18, 1974) and Senator Taft, 120 Cong. Rec. S 6940 (daily ed. July 10, 1974).

specifically rejected a bill proposed by Senator Taft which would have limited the number of appropriate bargaining units.^{18/}

Indeed, Congress made it clear that, in the final analysis, the matter of unit determination would be left to the discretion of the Board. As Senator Williams, chairman of the Senate Committee on Labor and Public Welfare and sponsor of the original bill which culminated in the amendments, stated (120 Cong. Rec. S 12104 (daily ed. July 10, 1974)):

The National Labor Relations Board has shown good judgment in establishing appropriate units for the purposes of collective bargaining, particularly in wrestling with units in newly covered industries. While the Board has, as a rule, tended to avoid an unnecessary proliferation of collective bargaining units, sometimes circumstances require that there be a number of bargaining units among nonsupervisory employees, particularly where there is such a history in the area or a notable disparity of interest between employees in different job classifications.

While the committee clearly intends that the Board give due consideration to its admonition to avoid an undue proliferation of units in the health care industry, it did not within this framework intend to preclude the Board acting in the public interest from exercising its specialized experience and expert knowledge in determining appropriate bargaining units. . . (emphasis supplied)

Representative Thompson, Chairman of the House Committee on Education and Labor, also made it clear that Congress intended that the Board remain free to apply its traditional standards in making such determinations, stating (120 Cong. Rec. E 4899 (daily ed. July 22, 1974):

^{18/} Senate Report No. 93-766, 93rd Cong., 2nd Sess. (1974) p. 2. Senator Taft's bill (S. 2292, 93d Cong., 1st Sess. (1973)) provided for no more than four appropriate units: (1) all professional employees; (2) all technical employees; (3) all clerical employees; and (4) all service and maintenance employees.

With respect to the question of bargaining units, the committee stressed its concern with preventing an undue proliferation of bargaining units in the health care industry which would reflect the statutory mandates. By so doing, however, the committee did not intend to foreclose the Board from continuing to determine traditional craft and departmental units, such as stationary engineers in the health care field. With these directions, the Board in its continuing review of the health care industry should be free to employ its expertise in determining appropriate units. (emphasis supplied)

Congress' rejection of Senator Taft's amendment, which would have precluded the Board from finding a unit appropriate if it did not include all service and maintenance employees, weighs heavily against the Hospital's position herein. This action, as well as the statements reflecting congressional confidence in the Board's specialized experience in designating units appropriate for bargaining, support the propriety of the Board's unit determination in this case. As the Board stated in Jewish Hospital of Cincinnati, 223 NLRB 614, 616 (1976):

. . . Congress left the matter of the determination of appropriate units to the Board, and the desire for nonproliferation does, not, in our judgment, necessarily preclude our granting maintenance units in the health care area. Congress was aware that the Board has sometimes found that a separate maintenance unit is appropriate if the maintenance employees possess a community of interest sufficiently separate and distinct from the broader community of interest which they share with other employees to warrant their inclusion in a separate unit. Yet, it did nothing to preclude our granting such units. Congress in fact rejected Senator Taft's suggestion that maintenance employees should always be combined with service employees in a single unit. (footnotes omitted.)

The SLRB, in making its unit determinations in the instant case, specifically considered the matter of over-proliferation of bargaining units in the health care industry. Thus, in weighing the various factors for and against a separate unit of maintenance department employees, as opposed to a combined service and maintenance unit, the SLRB took into account its "policy against over-compartmentalization of hospitals into numerous small bargaining units" (A. 529). And, only after finding that all of the factors were evenly balanced did the SLRB direct a self-determination election.

Finally, as the New York Court of Appeals pointed out (298 N.E. 2d at 618):

Without merit is the hospital's argument that the unit selected may improperly fragment the hospital into numerous small units. . . . Actually, the board's practice in allowing skilled maintenance employees in hospitals to form a separate bargaining unit if they wish to do so, far from constituting over-compartmentalization, has avoided more serious fragmentation into numerous smaller units since, under the mandatory craft unit provision of subdivision 2 of section 705, each skilled craft, such as plumbers, painters and carpenters, could have demanded and could have been included in a separate unit.

B. The Hospital Has no Valid Defense for its Refusal to Bargain

1. The Union is the majority representative of the maintenance and engineering department employees.

As shown in the counterstatement supra, after nearly 10 years of litigation over the validity of the Union's certification, in March 1974 the Hospital finally commenced bargaining with the Union. The Hospital had raised a variety of objections to the SLRB representation

proceeding -- it had challenged both the unit determination and the conduct of the election itself -- but all of its contentions ultimately were rejected by the New York Court of Appeals. Even after the Hospital finally recognized the Union and commenced bargaining, however, it still continued to press its position at the negotiating sessions that the unit was inappropriate. Finally, in August 1975, when the Hospital abruptly refused to bargain further, the reason given was that Hospital still believed the unit to be inappropriate.

Before this Court, the Hospital continues to assert its basic position that the unit is inappropriate and, in addition, argues that even if the maintenance and engineering unit was appropriate in 1964, changes in the Hospital's organization and operations occurring since that time now render it inappropriate. The changes relied on by the Hospital are discussed in more detail infra, pp. 25-27, but it is worth noting here that the size of the unit has not changed drastically since 1964, having grown from 55 employees at the time of the SLRB certification to 69 employees at the present time (A. 154-155). The fact that only eight of those employed in 1964 still work in the unit is suggested by the Hospital to be reason justifying its refusal to bargain (Br. 14). The suggestion is without merit, however for employee turnover is commonplace, and it is well settled that standing alone it is not a reasonable basis for doubting a Union's majority or refusing to bargain. N.L.R.B. v. Washington Manor Inc., 519 F. 2d 750, 753 (C.A. 6, 1975), and cases cited.

Although the Hospital does not claim that the Union has lost its majority, it asserts that the SLRB certification is "stale" and that it in

effect expired on March 4, 1975, one year after the Supreme Court denied review of the New York Court of Appeals' bargaining order (Br. 49-50). The Board rejected this same argument, noting that the Hospital "has misconceived the nature of a certification of representative" (A. 495). For it is well settled that a union that enjoys the status of majority bargaining representative for a unit of employees, either following certification or as the result of recognition by the employer, is irrebuttably presumed to retain that status for at least one year, and thereafter, subject to the presumption's being rebutted. Brooks v. N.L.R.B., 348 U.S. 96, 103-104 (1954); N.L.R.B. v. Frick Co. 423 F. 2d 1327, 1332 (C.A. 3, 1970), and cases cited; N.L.R.B. v. Crimptex, Inc., 517 F. 2d 501, 503 (C.A. 1, 1975). Accordingly, where the presumption of continuing majority after one year is operative, as it was here, an employer's withdrawal of recognition from an incumbent union constitutes a prima facie violation of Section 8(a) (5) and (1) of the Act. Although the presumption may be rebutted by the employer's adducing evidence of a reasonably based doubt of the union's majority based on objective facts,^{19/} as noted above, the Hospital has made no such showing. The Hospital misstates the law, therefore, by its assertion that it was only obligated to bargain for one year, or until March 4, 1975, because the certification expired on that date. As the cases cited above indicate, the passage of time alone is not justification for an employer's withdrawal of recognition from a union.

^{19/} Terrell Machine Co. v. N.L.R.B., 427 F. 2d 1088, 1090 (C.A. 4, 1970), cert. denied 398 U.S. 929; N.L.R.B. v. Little Rock Downtowner, 414 F. 2d 1084, 1090-1092 (C.A. 8, 1969).

2. The maintenance and engineering department employees constitute an appropriate unit for purposes of collective bargaining

The Hospital's basic defense throughout this protracted litigation has been that a separate unit of maintenance and engineering department employees is not appropriate for purposes of collective bargaining. As we have seen, this contention was rejected by the New York Court of Appeals. The Hospital now argues, however, that the unit is not appropriate in light of other Board unit determinations and therefore that the Board erred in finding that it violated Section 8(a)(5) of the Act. The Hospital's contention is without merit for, as shown above, in granting comity to the SLRB unit determination, the Board did not make an independent determination that the unit was appropriate. Rather, the Board accepted the SLRB's determination of the issue, finding that the state agency's unit determination was not contrary to the Act and that its procedures did not violate due process (A. 492-493). By taking as settled the unit determination previously made in the SLRB proceeding, the Board followed its customary practice of not permitting relitigation of issues which were or could have been litigated in a prior representation proceeding. See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); N.L.R.B. v. Horn & Hardart Co., 439 F. 2d 674, 682-683 (C.A. 2, 1971).

The Hospital contends that the Board's approval of a separate maintenance and engineering department bargaining unit in this case conflicts with its decision in other hospital cases where such units have been disapproved (Br. 54). The Hospital's position is without merit,

however, for the Board has long held that a separate unit of maintenance employees is appropriate when the record establishes "that maintenance employees are readily identifiable as a group whose similarity of function and skills create a community of interest such as would warrant separate representation." American Cyanamid Company, 131 NLRB 909, 910 (1961); Gerber Products Co., 162 NLRB 121, 122-123 (1966); Oscar Mayer Co., 172 NLRB 1471, 1472-1473 (1968). This principle is equally applicable where the employer is a hospital. See Miami Inspiration Hospital Inc., 175 NLRB 636, 637 (1969).

The Hospital cites various Board cases (Br. 54) which it asserts conflict with the decision herein. However, the important fact that distinguishes those cases from the instant one is that this decision is based on the principle of comity and a recognition of the past history of this proceeding. It is possible that the Board might have decided the unit issue differently, if this case had come before it initially as a representation proceeding in which the Union was seeking an election in a separate maintenance and engineering unit. However, the Board reasonably concluded that a different result is warranted here, for the Union is not seeking representation rights as an original matter, but rather it has been legally certified for 13 years as the bargaining representative for the maintenance and engineering employees. During most of that period its status was in dispute, but after its certification by the SLRB was upheld by the New York Court of Appeals, collective bargaining negotiations between the Hospital and the Union did take place for over a year. It has long been recognized that the Board

may properly give substantial weight to "collective bargaining history" in deciding upon the appropriateness of a particular bargaining unit.

N.L.R.B. v. National Broadcasting Co., 150 F. 2d 895, 898 (C.A. 2, 1945);

N.L.R.B. v. Bayliss Trucking Co., 432 F. 2d 1025, 1028 (C.A. 2, 1970).

The Hospital further contends that in the 13 years which have elapsed since the SLRB issued its certification to the Union, the Hospital has undergone changes in its operation and organization with the result that a separate unit of maintenance and engineering department employees is now inappropriate. However, we show below that the Board did not abuse its discretion in finding that a separate unit of hospital maintenance employees continues to constitute an appropriate unit for bargaining.

As this Court stated in Wheeler-Van Label Co. v. N.L.R.B., 408 F. 2d 613, 616 (C.A. 2, 1969), cert. denied, 396 U.S. 834, quoted with approval in MPC Restaurant Corp. v. N.L.R.B., 481 F. 2d 75, 78 (C.A. 2, 1973):

[A] Company undertakes a sizeable burden in arguing that the unit found was not an appropriate one; there can be no dispute that the Board has considerable leeway in exercising its judgment under Section 9(b) of the Act. . . as to the appropriateness of a given unit. A unit finding by the Board "involves a large measure of informed discretion." Packard Motor Car Co. v. N.L.R.B., *supra*, 330 U.S. 485 (1974), and where it is supported by substantial evidence, will not be reversed "in the absence of an 'arbitrary or capricious exercise of administrative discretion,'" Empire State Sugar Co. v. N.L.R.B., 401 F. 2d 559, 562 (C.A. 2, 1968).

The Hospital's argument centers around (1) the changes that have occurred in its facilities since the maintenance unit was certified (Br. 11-13) and (2) the changes in departmental organization (Br. 13-15). The record shows that the Hospital in 1964 operated primarily

out of two in-patient buildings, 1 1 several miles from one another. and now it is : 1 y housed in a single new hospital building connected to one of : 1 two original buildings by a bridge and that the remaining building has been closed (A. 151-154, 286). Obviously, if the unit was appropriate when it was located in separate facilities, it would scarcely be less appropriate because it was brought into a central location. Moreover, even though the hospital claims that through modernization it has simplified its equipment, it has not demonstrated that such simplification has eliminated the need for, and utilization of, a separate group of employees to maintain such equipment.

The Hospital reorganized its maintenance employees by subdividing them into functional groups and appointing lower echelon supervisors who report to the Director of Engineering (A. 156-159, 171-172). Despite this subdivision, however, all of the maintenance employees still work directly under the Director of Engineering and they are the only employees under that official, who has the authority to hire and fire (A. 267-271). Moreover, the fact that the unit has increased from 55 to 69 employees and that of the original group only 8 are still employed in the unit has no bearing on the continued appropriateness of the unit. Furthermore although the Hospital eliminated specific job titles for many of the maintenance and engineering department employees, their work and responsibilities remained unchanged, with a number of these employees continuing to perform the work of such specialized and skilled classifications as plumbers, electrician, refrigeration

mechanic. (A. 187-189, 208-211, 262, 273-274, 286, 296-300, 315-316, 393-394, 408-409, 424-426, 436-444, 455-456, 480-481). Thus, we submit, the Board's finding that these changes in the Hospital's operation "do not materially affect the community of interest of the maintenance and engineering department employees" is entirely reasonable (A. 496). Moreover, the Hospital is in a poor position to rely on these changes since they were made unilaterally while the Hospital was refusing to bargain with the Union.

II. THE BOARD'S ORDER IS REASONABLE AND PROPER

As noted supra, the Board's order requires the Company to cease and desist, not only from engaging in the unfair labor practices found, but also from "in any manner" interfering with, restraining or coercing employees in the exercise of their rights under the Act (A. 498). The Hospital contends (Br. 67-69) that such a broad cease-and-desist order is unjustified in the present case. This contention, we submit, is without merit.

The Supreme Court has stated that "the relation of remedy to policy is peculiarly a matter for administrative competence" (Phelps-Dodge Corp. v. N.L.R.B., 313 U.S. 177, 104 (1941)), and, accordingly, "it is for the Board, not the Courts, to determine how the effect of prior unfair labor practices may be expunged." International Ass'n of Machinists v. N.L.R.B., 311 U.S. 72, 82 (1940).^{20/} Thus, Board orders should

^{20/} Accord: N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344 (1953). See also Consolo v. Federal Maritime Commission, 383 U.S. 607, 621 (1966).

not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Electric & Power Co. v. N.L.R.B., 319 U.S. 533 (1943); Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 216 (1964).

Upon review of the circumstances of this proceeding, the Board found that, since the Hospital's violations "go to the very heart of the Act," a broad cease-and-desist order is warranted (A. 497). See N.L.R.B. v. Entwistle Mfg. Co., 120 F. 2d 532, 536 (C.A. 4, 1941). As we have seen, the Hospital initially refused to recognize and bargain with the Union in 1964. For 13 years the Hospital has resorted to litigation in response to its employees' demands for collective bargaining through their chosen representative. The Hospital, of course, has the right to litigate, but the employees also had rights, including, under both state law and federal law, the right to have the Union negotiate a contract with the Hospital pursuant to the original certification. Even during the several-month period following the New York Court of Appeals' decision, when there were some negotiations between the parties, the Hospital demonstrated a lack of commitment to the principle of collective bargaining by its continued insistence that the bargaining unit was inappropriate. This tack was taken despite the fact that the Hospital at the time was under an injunction from the New York Court of Appeals to bargain in good faith. These facts evidence the Hospital's obvious disdain for the statutory obligation to bargain with the duly certified representative of its employees, an

obligation which is central to the purposes and policies of the Act. In these circumstances, we submit, the Board was clearly warranted in broadly enjoining the Hospital from committing any additional violations of the Act. See N.L.R.B. v. Krimm Lumber Co., 203 F. 2d 194, 196 (C.A. 2, 1953); Precision Fabricators, Inc. v. N.L.R.B., 204 F. 2d 567, 569 (C.A. 2, 1953); Allegheny Pepsi-Cola Bottling Co. v. N.L.R.B., 312 F. 2d 529, 532 (C.A. 3, 1962); Central Mercedita, Inc. v. N.L.R.B., 288 F. 2d 809, 812 (C.A. 1, 1961). Moreover, contrary to the Hospital's contention (Br. 69), the fact that the Hospital has not committed any other unfair labor practices does not mean that a broad cease-and-desist order would be inappropriate in this case. Morgan Precision Parts v. N.L.R.B., 444 F. 2d 1210, 1215 (C.A. 5, 1971). As this Court has recognized, "the Board is afforded wide latitude in fashioning relief." N.L.R.B. v. Jack La Lanne Management Corp., 539 F. 2d 292, 295 (1976). Under the circumstances of this case, we submit that a broad cease-and-desist order was properly found by the Board to be justified.

CONCLUSION

For the foregoing reasons it is submitted that a judgment should be entered denying the Hospital's petition for review and enforcing the Board's order in full.

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August 1977.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE LONG ISLAND COLLEGE HOSPITAL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

and

LOCAL 144, MOTEL, HOSPITAL, NURSING
HOME AND ALLIED SERVICES UNION,
SEIU, AFL-CIO,

Intervenor.

No. 77-4083

77-4099

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies of the Board's brief in the above-captioned case have this day been served upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.

this 4th day of August, 1977.